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MICHAEL RODAK, JR.

In the Supreme Court
OF THE
United States

October Term, 1972

No. ____

NATIONAL SURETY CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Date: MAY 25 1972

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No. ____

NATIONAL SURETY CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner National Surety Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Claims entered in this proceeding on March 17, 1972.

OPINIONS BELOW

The opinions of the United States Court of Claims, not yet reported, appear in the Appendix hereto.

JURISDICTION

On October 29, 1971, the United States Court of Claims entered an order dismissing the petitioner's petition, for failure to state a claim upon which relief may be granted. A timely motion for re-hearing was denied on March 17, 1972, and this petition for a writ of certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1255(1).

QUESTION PRESENTED

Whether percentage funds retained by the United States pursuant to a Federal construction contract may be subjected to tax claims of the United States against the contractor, despite the claims of a payment-bond surety who has paid laborers and materialmen.

STATUTORY PROVISIONS INVOLVED

26 U.S.C. § 6323, provides in part as follows:

> **(a) Purchasers, Holders of Security Interests, Mechanics Lienors, and Judgment Lien Creditors.** – The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgement lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary or his delegate.
>
> . . . .
>
> **(c) Protection for Certain Commercial Transactions, Financing Agreements, Etc.** –
>
> **(1) In General** – To the extent provided in this subsection, even though notice of a lien imposed

by section 6321 has been filed, such lien shall not be valid with respect to a security interest which came into existence after tax lien filing but which –

(A) is in qualified property covered by the terms of a written agreement entered into before tax lien filing and constituting –

. . . .

(iii) an obligatory disbursement agreement, and

(B) is protected under local law against a judgement lien arising, as of the time of tax lien filing, out of an unsecured obligation.

. . . .

(4) Obligatory Disbursement Agreement. – For purposes of this subsection –

(A) Definition. – The term "obligatory disbursement agreement" means an agreement (entered into by a person in the course of his trade or business) to make disbursements, but such an agreement shall be treated as coming within the term only to the extent of disbursements which are required to be made by reason of the intervention of the rights of a person other than the taxpayer.

(B) Limitation on Qualified Property. – The term "qualified property", when used with respect to an obligatory disbursement agreement, means property subject to the lien imposed by section 6321 at the time of tax lien filing and (to the extent that the acquisition is directly traceable to the disbursements referred to in subparagraph (A)) property acquired by the taxpayer after tax lien filing.

(C) Special Rules for Surety Agreements. – Where the obligatory disbursement agreement is

an agreement ensuring the performance of a contract between the taxpayer and another person –

(i) the term "qualified property" shall be treated as also including the proceeds of the contract the performance of which was ensured, and

(ii) if the contract the performance of which was ensured was a contract to construct or improve real property, to produce goods, or to furnish services, the term "qualified property" shall be treated as also including any tangible personal property used by the taxpayer in the performance of such ensured contract.

. . . .

(h) Definitions. – For the purposes of this section and section 6324 –

Security Interest. – The term "security interest" means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.

STATEMENT OF THE CASE

In its petition filed in the United States Court of Claims, the petitioner alleged that on or about January 20, 1967, the Federal government, through the Federal Highway Administration, Bureau of Public Roads, entered into a contract

with Glacier Construction Company for construction of a section of highway located near Yakutat, Alaska. Pursuant to 40 U.S.C § 270a, Glacier Construction Company posted "Miller Act" payment and performance bonds to secure the satisfactory completion of the contract. Petitioner was the surety on the payment and performance bonds.

Prior to completion of the contract by Glacier Construction Company, Glacier became financially unable to meet its obligations under the terms of the contract, and the petitioner, in accordance with its obligations under the payment bond, paid labor and materialmen's claims in the amount of $125,946.90. Of this amount, an amount in excess of $91,000.00 was paid subsequent to the date of filing of the notices of Federal tax liens referred to below. The said contract was fully performed to the Government's satisfaction on July 30, 1968. On this date, the defendant had in its possession, for disbursement, retainage funds, representing the unpaid contract balance, in the amount of $78,534.89.

On or about April 1, 1968, the Internal Revenue Service filed notices of Federal tax liens against Glacier Construction Company in the amount of $96,069.99. On or about September 20, 1968, the Internal Revenue Service levied upon and received the full amount of the said retained funds in partial satisfaction of the tax assessments against Glacier Construction Company.

In its petition before the Court of Claims, petitioner claimed the $78,534.89 in retainage funds. The United States moved to dismiss the petition for failure to state a claim upon which relief may be granted. The Court of Claims granted the motion to dismiss on the ground that a "surety cannot recover

from the accumulated retainages, fees from tax set-off, amounts it expended under the payment bond." The Court of Claims denied a motion for re-hearing (in which petitioner relied on 26 U.S.C. § 6323), on the ground that the "statute referred to does not change the prior law respecting off-set of tax liabilities of a contractor against sums remaining due and claimed by a surety which had paid laborers and materialmen under a payment bond."

Generally speaking, under a payment bond, the surety guarantees payment to persons furnishing labor and materials to the contractor, and under a performance bond, the surety guarantees that the contract will be satisfactorily completed in the event the contractor is unable to do so.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With a Previous Decision of This Court and With Decisions of Courts of Appeals

The lower courts are in conflict as to the respective rights of a surety and the Government to retainage funds under a Federal construction contract. The conflict is created by differences in opinion on the relationship of *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132 (1962), to the Court's previous decision in *United States v. Munsey Trust Co.*, 332 U.S. 234 (1947). Apart from the statutory provisions referred to *infra*, the surety's rights to retainage funds, as against Government claims for taxes owed by the contractor, depend on whether the surety is subrogated to the Government's rights in the retainage funds to the extent of its disbursements under the surety bonds.

The Fourth Circuit, and two district courts, have taken the position that *Pearlman* had the effect of overruling *Munsey Trust*. *See Western Cas. & Sur. Co. v. Brooks*, 362 F.2d 486 (4th Cir. 1966); *Home Indem. Co. v. United States*, 313 F. Supp. 212 (D.Mo. 1970); *Travelers Indem. Co. v. First Nat'l State Bank*, 328 F. Supp. 208, 215 (D.N.J. 1971). The Court of Claims and the Fifth Circuit have taken the position that *Pearlman* controls as to a performance bond surety, but that *Munsey Trust* controls as to a payment bond surety. *See Security Ins. Co. v. United States*, 192 Ct. Cl. 754, 428 F. 2d 838 (1970); *Aetna Cas. & Sur. Co. v. United States*, 435 F. 2d 1082 (5th Cir. 1970).

Insofar as relevant to the petitioner's contentions herein, the holding in *Munsey Trust* was that a surety was not subrogated to the Government's right to the retainage funds by virtue of disbursements under a payment bond. In *Pearlman*, the Court took a contrary position and held that a payment bond surety was entitled to subrogation to the rights of the Government (371 U.S. at 138):

> . . . the United States was entitled to protect itself out of the [retainage] fund, and . . . the surety, by asserting the right to subrogation, could protect itself by resort to the same securities and same remedies which had been available to the United States for its protection against the contractor.

The Court went on to state that the surety, by subrogation, was entitled to all the rights of the Government, the contractor, and laborers and materialmen "to the extent necessary to reimburse it." (372 U.S. at 141). The Court further noted that the same rights to subrogation exist in the surety "whether its bond be for performance or payment."

Petitioner submits that these statements in *Pearlman* cannot be squared with the statements regarding subrogation in *Munsey Trust*. *See Traveler's Indemnity*, 328 F. Supp. at 215; *Home Indemnity*, 313 F. Supp. at 214-15. Petitioner further submits that the decision below is in irreconcilable conflict with *Pearlman*. The decision below creates a distinction between a payment bond surety and a performance bond surety, despite the unequivocal language in *Pearlman* that the rights of the surety are the same without regard to whether the surety is proceeding under a payment bond or a performance bond.

In distinguishing *Munsey Trust*, the court in *Pearlman* stated that the court there held that "the Government could exercise the well-established common-law right of debtors to offset claims of their own against their creditors." (371 U.S. at 140). This was not the holding nor the rationale of *Munsey Trust* – *Munsey Trust* in fact held that the surety was not entitled to subrogation to the rights of the Government. This holding is directly contrary to the holding in *Pearlman* that such subrogation rights do exist.

The conflict between *Pearlman* and *Munsey Trust*, and the resulting conflict in the lower court decisions, some of which rely on *Pearlman* and some of which rely on *Munsey Trust Co.*, have become a source of controversy and confusion which should be settled and clarified by this Court.

2. The Decision Below Raises Fundamental Questions of Fairness and Proper Administration of Government Contracts Which Should be Settled by This Court

As noted above, the Court of Claims has taken the position that the surety's rights are dependent on whether the surety's

disbursements are made under a payment bond or under a performance bond. In consequence, the surety's position is in effect subject to the timing by the Government of the contractor's default.

If tax setoff is allowed as to a payment bond but not as to a performance bond, it is to the Government's advantage to acquiesce in and encourage the contractor to continue on the job even after it is apparent that the contractor will be unable to meet his obligations to laborers and materialmen. Labor and materials supplied prior to the contractor's default generally fall under the payment bond; labor and materials supplied after default generally fall under the performance bond. The opportunity for abuse by the Government, at the expense of the surety, is obvious. The Government is in a position to create a fund against which to offset tax claims by appropriately timing the declaration of default. The size of the fund, whether in the form of progress payments or retainage funds due under the contract, and the benefit to the Government, will increase in direct proportion to the amount of labor and materials which the contractor is permitted to obtain prior to default without making payment therefor.

Thus, if the contractor orders and receives substantial materials shortly prior to default, according to the decision below, the Government is entitled to claim that the contract amounts otherwise payable by the Government to the contractor for such materials may be permanently withheld to satisfy Federal tax claims against the contractor. The surety is required to pay for the materials, yet it is deprived of the contract price to the extent of tax claims against the contractor. On the other hand, if the Government defaults the contractor

before such materials are ordered and received, the surety is required to supply and pay for such materials under the performance bond. In this latter case, however, according to the decision below, the surety is entitled to the contract amounts free from tax setoff. The inequity of this situation to the surety, and the incongruity of according different treatment under a performance bond as opposed to a payment bond, are manifest. The Government may, by the timing of its declaration of default, renege on the contract price as to amounts expended by the surety in satisfying the contractor's obligations. In effect, the surety steps into the contractor's position under the contract, but at a contract price reduced by any tax claims the Government has against the contractor.

Petitioner submits that the foregoing matters raise important questions of the proper administration of Government contracts which justify the grant of certiorari to review the judgment below.

3. The Decision Below Raises an Important Question of First Impression Under the Federal Tax Lien Act of 1966.

In denying the petitioner's motion for rehearing below, the Court of Claims relied on *Aetna Insurance Company v. United States*, an unreported decision of the Court of Claims handed down the same day (a copy of the *Aetna* decision appears in the Appendix hereto). Under the literal language of the Federal Tax Lien Act of 1966, 26 U.S.C. § 6323, a payment-bond surety is granted priority over a Federal tax lien. In the decision below and in *Aetna*, however, the Court of Claims held that the Tax Lien Act of 1966 had no effect on the Government's right to setoff, which was held to exist independent of tax lien rights.

Consequently, the Government is permitted, by resort to non-statutory procedures, to obtain priorities which are expressly denied to it in regard to tax liens by virtue of § 6323. Petitioner submits that the recognition of "common-law" tax enforcement remedies separate and independent from the detailed network of statutory collection procedures set forth in the Internal Revenue Code of 1954, raises a substantial question on the proper construction and effect of the Federal Tax Lien Act of 1966.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision below of the Court of Claims.

Respectfully submitted,

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Dated: MAY 25 1972

APPENDIX TO PETITION

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IN THE UNITED STATES COURT OF CLAIMS

No. 651-71

NATIONAL SURETY CORPORATION

v.

THE UNITED STATES

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges*.

ORDER

This case comes before the court on defendant's motion, filed August 30, 1971, to dismiss the petition. Upon consideration thereof, together with the opposition thereto, without oral argument, it is noted that the allegations of plaintiff's complaint are to the effect that plaintiff was obliged to pay labor and materialmen under both performance and payment bonds but that its claim is founded on the payment bond. Defendant argues that since plaintiff's petition specifically alleges it paid labor and materialmen's claims, and does not allege it completed performance, those payments must have been under the payment bond and, therefore, under the authority of *Security Insurance Company* v. *United States*, 192 Ct. Cl. 754, 428 F. 2d 838 (1970), and *United States* v. *Munsey Trust Company*, 332 U.S. 234 (1947), a surety cannot recover from the accumulated retainages, free from tax setoff, amounts it expended under the payment bond. The situation is different if payments, even to labor and materialmen, are made under the performance bond. The *Aetna Casualty and Surety Company* v.

United States, 435 F. 2d 1082 (5th Cir. 1970). But we agree with defendant that on the basis which this case comes before the court plaintiff is not entitled to recover.

IT IS THEREFORE ORDERED that defendant's said motion to dismiss the petition be and the same is granted and plaintiff's petition is dismissed. This dismissal, however, is without prejudice to the filing by plaintiff within thirty (30) days from this date of an amended petition, if it can so do, alleging that it in fact made the payments under the performance bond.

BY THE COURT

JUDGE LARAMORE

Acting for the Chief Judge

October 29, 1971

IN THE UNITED STATES COURT OF CLAIMS

No. 651-71

NATIONAL SURETY CORPORATION

v.

THE UNITED STATES

Before COWEN, *Chief Judge*, LARAMORE and DURFEE, *Senior Judges*, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges*.

ORDER

This case comes before the court on plaintiff's motions for rehearing and for oral argument, filed November 29, 1971, together with defendant's opposition thereto and the briefs of the parties in support of their respective positions. We had dismissed plaintiff's petition by an order entered on October 29, 1971.

Plaintiff is a surety company which made payments pursuant to a surety bond to laborers and materialmen under a government contract with Glacier Construction Company. It seeks retainage funds which defendant has subjected to a tax offset. Plaintiff now relies on Section 6323, Internal Revenue Code of 1954, as amended, as having changed the prior law. We have recently had before us the indentical contentions, and on March 17, 1972, decided in *Aetna Insurance Co.* v. *United States*, Ct. Cl. No. 371-70 (slip opinion) that the statute referred to does not change the prior law respecting offset of tax liabilities of a contractor against sums remaining due and claimed by a surety which had paid laborers and materialmen

under a payment bond. We do not think a further oral argument would be in the interests of justice, at this time, without regard to whether defendant, prior to the dismissal order, stated the grounds on which it now relies, sufficiently to be "fair notice" under the rule of *General Electric Co.* v. *United States*, 189 Ct. Cl. 116, 416 F.2d 1320 (1969).

IT IS THEREFORE ORDERED, on the authority of *Aetna Insurance Co.* v. *United States, supra*, that plaintiff's motion for rehearing be and the same is denied and it is further ordered that plaintiff's motion for oral argument is denied.

BY THE COURT

Chief Judge

March 17, 1972

In the United States Court of Claims

No. 371–70

(Decided March 17, 1972)

AETNA INSURANCE COMPANY v. THE UNITED STATES

Edward Gallagher, attorney of record, for plaintiff.

Ira Mark Bloom, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Philip R. Miller* and *Joseph Kovner*, of counsel.

Before COWEN, *Chief Judge*, LARAMORE, *Senior Judge*, DAVIS, COLLINS, SKELTON, NICHOLS, and KASHIWA, *Judges*.

ON PLAINTIFF'S MOTION AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

COWEN, *Chief Judge*, delivered the opinion of the court:

By the parties' cross-motions for summary judgment, we are called upon to decide again whether the right of the United States to set off the unpaid contract balance against taxes owed it by a Government contractor is superior to a claim to the same contract retainage by a Miller Act [1] surety under its payment bond.

The material facts are not in dispute. Allied Electrical Company, Inc., hereinafter Allied, entered into a contract dated February 11, 1965, with the General Services Adminis-

[1] 49 Stat. 793 (1935), 40 U.S.C. § 270a *et seq.*

tration to provide certain electrical work at Howard University, Washington, D.C. Plaintiff Aetna Insurance Company was the surety upon the performance and payment bonds provided by Allied pursuant to Miller Act provisions.

The date of substantial completion under the contract was established by the contracting officer as October 4, 1966, but this date was extended by extensions of time to January 16, 1967. On October 10, 1967, a major supplier left unpaid by Allied obtained a default judgment against the contractor in the amount of $18,525.39. On April 19, 1968, the Internal Revenue Service served a notice of levy upon the General Services Administration for taxes, penalties, and interest owed to the United States by Allied in an amount finally determined to be $14,130.07. Thereafter, plaintiff paid the default judgment, taking an assignment of the supplier's claim against Allied,[2] and requested the General Services Administration to pay over the remaining balance under its contract with Allied.[3] Plaintiff was advised, however, that the matter was being referred to the General Accounting Office for settlement because of the outstanding notice of levy. The General Accounting Office denied plaintiff's claim, setting off the remaining contract balance against the unpaid tax liability. Plaintiff requested reconsideration, and the Comptroller General affirmed the setoff by letter dated July 16, 1970.

It should be noted at the outset that plaintiff does not ask us to overrule our decision in *Barrett* v. *United States*, 177 Ct. Cl. 380, 367 F. 2d 834 (1966). The dispute over contract retainages in *Barrett* was between a Miller Act payment bond surety, which had paid the claims of laborers and materialmen against their contractor, and the United States, which had set off against the retainages an amount for tax deficiencies assessed against the contractor. We held that the surety's claim was subordinate and inferior to the right of the United States to set off the amount of taxes owed to it by

[2] A prior assignment to the supplier from Allied of monies to become due under the contract had been made on April 25, 1967.

[3] The balance owed under the contract upon completion of the contract work was the sum of $15,766.95. As a result of the above-mentioned extensions of time, however, liquidated damages in the sum of $6,240 were assessed against Allied, reducing the unpaid contract balance to $9,526.95, the amount plaintiff seeks in this suit.

the contractor. The touchstone in *Barrett* was the Supreme Court's decision in *United States* v. *Munsey Trust Co.*, 332 U.S. 234 (1947), which permitted the Government to set off an amount owed to it by its contractor against retainages claimed by the Miller Act surety under its payment bond. In the course of that opinion, however, the Court suggested a different outcome where the surety completed the Government's contract pursuant to a performance bond.

Later cases, relying on *Munsey Trust*, have held that a Miller Act surety who completes the contract on default of the contractor is entitled to the contract retainages in the hands of the Government, free from setoff for taxes owed by the contractor. However, each of these decisions reaffirmed the *Munsey* rule in situations where the Government's right of setoff is challenged by the surety under its payment bond. See *Security Insurance Co.* v. *United States*, 192 Ct. Cl. 754, 428 F. 2d 838 (1970); *Trinity Universal Insurance Co.* v. *United States*, 382 F. 2d 317 (5th Cir. 1967); *cert. denied*, 390 U.S. 906 (1968); *Aetna Casualty and Surety Co.* v. *United States*, 435 F. 2d 1082 (5th Cir. 1970).

It is plaintiff's principal contention here that the distinction made in these cases between the priority rights of a performance bond surety and those of a payment bond surety is no longer valid in light of the enactment into law of the Federal Tax Lien Act of 1966.[4] Plaintiff says that the lan-

[4] 80 Stat. 1125. Only insofar as it is relevant herein, the Federal Tax Lien Act of 1966 amended section 6323 of the Internal Revenue Code of 1954 to read as follows:

"SEC. 6323. VALIDITY AND PRIORITY AGAINST CERTAIN PERSONS.

"(a) Purchases [sic], Holders of Security Interests, Mechanic's Lienors, and Judgment Lien Creditors.—The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary or his delegate.

* * * * *

"(c) Protection for Certain Commercial Transactions Financing Agreements, etc.—

"(1) In General.—To the extent provided in this subsection, even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid with respect to a security interest which came into existence after tax lien filing but which—

"(A) is in qualified property covered by the terms of a written agreement entered into before tax lien filing and constituting—

* * * * *

"(iii) an obligatory disbursement agreement, and

"(B) is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

* * * * *

guage of section 6323 of the Internal Revenue Code of 1954,[5] as amended by the Federal Tax Lien Act of 1966, gives sureties upon both payment and performance bonds, without distinction, priority over a federal tax lien.[6] Section 6323(a) gives a holder of a security interest priority over the tax lien, while section 6323(h)(1) broadly defines a security interest to mean "any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability." More specifically, section 6323(c)(1) provides that security interests in qualified property arising from obligatory disbursement agreements, entered into before the tax lien is filed, are protected against the lien even though funds are advanced under the agreement after the filing of the tax lien. Where the obligatory disbursement agreement is a surety contract ensuring the performance of a contract between the taxpayer and another person, section 6323(c)(4)(C)(i) provides that the term qualified property includes "the proceeds of the contract the performance of which was ensured."

"(4) Obligatory Disbursement Agreement.—For purposes of this subsection—

"(A) Definition.—The term 'obligatory disbursement agreement' means an agreement (entered into by a person in the course of his trade or business) to make disbursements, but such an agreement shall be treated as coming within the term only to the extent of disbursements which are required to be made by reason of the intervention of the rights of a person other than the taxpayer.

"(B) Limitation on Qualified Property.—The term 'qualified property', when used with respect to an obligatory disbursement agreement, means property subject to the lien imposed by section 6321 at the time of tax lien filing and (to the extent that the acquisition is directly traceable to the disbursements referred to in subparagraph (A)) property acquired by the taxpayer after tax lien filing.

"(C) Special Rules for Surety Agreements.—Where the obligatory disbursement agreement is an agreement ensuring the performance of a contract between the taxpayer and another person—

"(i) the term 'qualified property' shall be treated as also including the proceeds of the contract the performance of which was ensured. * * *

* * * * *

"(h) Definitions.—For purposes of this section and section 6324—

"(1) Security Interest.—The term 'security interest' means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth."

[5] All section references hereinafter are to the Internal Revenue Code of 1954.

[6] Pursuant to section 6321, a lien arises in favor of the United States when a person liable for a tax neglects or refuses to pay it after demand.

Relying heavily on the above-cited provisions of the statute, plaintiff argues that the *Munsey Trust* rule has been rendered inoperative by the enactment of the Federal Tax Lien Act of 1966 and that the application of the *Munsey* rule in this case would defeat the broad remedial purpose Congress had in mind when the law was passed.

Defendant agrees that the Federal Tax Lien Act of 1966 did indeed change the prior law with respect to the priority of the federal tax lien over other specified security interests. However, defendant maintains that the Act was concerned only with the priority to be accorded the federal tax lien and was not intended to and did not affect the ruling in the *Munsey Trust* case with respect to the Government's right of setoff.

We agree with defendant. The fundamental difficulty with plaintiff's argument is that the plain words of amended section 6323 grant priority only in terms of the lien imposed by section 6321. The statute does not purport to cover the situation at hand where the United States seeks to set off against taxes owed to it by its contractor funds remaining unpaid under the contract.

Plaintiff asserts that a resort to the legislative history of the Federal Tax Lien Act of 1966 is neither necessary nor proper to a decision in this case, and that the plain terms of the Act should persuade us to render judgment in its favor. As an alternative argument, however, plaintiff maintains that, while the statute may speak only of tax liens, it was the congressional policy, as shown by the legislative history surrounding the passage of the law, to grant a payment bond surety priority over the Government's right of setoff in the factual circumstances involved in this case. We have examined the legislative history relied on by plaintiff, and can find no support therein for its position. Rather than revealing the policy asserted by plaintiff, the historical discussion is restricted to situations involving the tax lien in competition with the interests of other creditors. Hearings before the House Committee on Ways and Means on H.R. 11256 and H.R. 11290, 89th Cong., 2d Sess. 37 and 38 (1966); H. Rep. No. 1884, 89th Cong., 2d Sess. 9 (1966); S. Rep. No. 1708, 89th Cong., 2d Sess. 9 (1966).

Also damaging to plaintiff's position is the following statement contained in the Treasury Department's technical explanation of that part of the proposed act dealing with the protection of surety companies making payments under a bond entered into before notice of a lien is filed:

> Finally, nothing in this bill is intended to reverse *U.S.* v. *Munsey Trust Co.* (1947) 332 U.S. 234, which held that the United States may set off amounts due it for taxes against amounts owned [sic] by the United States to the taxpayer under a contract. [Hearings before the House Committee on Ways and Means, *supra*, at 48.]

This written expression of the views of the Treasury Department was made a part of and attached to a written statement submitted by the Assistant Secretary of the Treasury at the hearing held by the House Committee on Ways and Means on March 2, 1966. The statement was made a part of the record and ordered to be printed. When the bill was favorably reported out by the House Ways and Means Committee and by the Senate Finance Committee, respectively, it was noted that the Treasury Department had urged the adoption of the bill. H. Rep. No. 1884 at 3; S. Rep. No. 1708 at 3. It would certainly be extraordinary for both committees to represent to Congress that the Treasury urged the adoption of the bill if, contrary to the views expressed by the Assistant Secretary of the Treasury, there was any intent on the part of either committee to reverse the holding in *Munsey Trust*.

There is yet another aspect of the legislative history which militates strongly against plaintiff's argument as to the congressional intent. It is clear from the same committee report that Congress intended that several of the provisions of the bill would change the existing law as set forth in certain decisions of the Supreme Court. Where this was the congressional purpose, the report stated that designated sections changed the results reached in such decisions, each of which was cited in the report. See H. Rep. No. 1184 at 37 with respect to *United States* v. *Buffalo Savings Bank*, 371 U.S. 228 (1963), and at 46 with respect to *United States* v. *Pioneer American Insurance Co.*, 374 U.S. 84 (1963) and *United*

States v. *Equitable Life Assurance Society of the United States*, 384 U.S. 323 (1966). We find no similar indication in the legislative history that Congress intended to reverse the result in the *Munsey Trust* case.

We conclude from the foregoing discussion of the legislative history that Congress intended in the Federal Tax Lien Act of 1966 to legislate only with respect to the priority accorded the Federal tax lien, and did not intend to affect the result in *Munsey Trust*.

Plaintiff relies on *Central Bank* v. *United States*, 345 U.S. 639 (1953) and *Home Indemnity Co.* v. *United States*, 313 F. Supp. 212 (W.D. Mo. 1970) as additional support for its contention that allowing the Government to prevail over the surety by right of setoff herein avoids the Federal Tax Lien Act of 1966. The *Central Bank* case, however, turned on the construction of the Assignment of Claims Act of 1940, and, as such, is of no help to plaintiff.

In *Home Indemnity*, the court was faced with several factual issues that are not presented here. However, plaintiff urges us to decide this case on the District Court's holding that the exercise of the Government's right of setoff avoids "the statutory scheme provided for the collection of taxes, whereby certain privileges and processes are afforded to the taxpayer." 313 F. Supp. at 216.[7] With deference to the able District Judge who wrote the opinion, we do not adopt that holding as a basis for decision in the factual situation before us. In our view, the statutory collection procedures and the Government's right of setoff are separate remedies and both are available to the Government.

In sum, we adhere to our decision in *Barrett* v. *United States*, *supra*, and hold that the Federal Tax Lien Act of 1966 did not affect the Government's right to set off against taxes owed to it by its contractor the unpaid contract balance claimed by plaintiff under its payment bond. Defendant's cross-motion for summary judgment is therefore granted, plaintiff's motion is denied, and the petition is dismissed.

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[7] The Government informs us that after notice of appeal was filed in *Home Indemnity*, the *Munsey Trust* issue in the case was settled by the parties. Brief for defendant at 11, n. 3.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1557

NATIONAL SURETY CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Claims (Pet. App. 13-16) are not reported.

JURISDICTION

The judgment of the Court of Claims was entered on October 29, 1971, and a petition for rehearing was denied on March 17, 1972. The petition for a writ of certiorari was filed on May 30, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether federal tax claims against a defaulting contractor may be satisfied out of unpaid contract funds retained by the government pursuant to the terms of the construction contract prior to any disbursement to the contractor's payment bond surety.

STATUTES INVOLVED

The pertinent provisions of Section 6323 of the Internal Revenue Code of 1954, 26 U.S.C. 6323, are set forth at Pet. 2-4.

STATEMENT

Petitioner is the payment bond surety of the Glacier Construction Company, which in January 1967 entered into a contract with the Federal Highway Administration to do work on a government highway construction project in Alaska. The Highway Administration was authorized to retain a percentage of the amounts accrued under the contract; these retainages were to be paid to Glacier upon completion and acceptance of the work contracted for and payment of all claims for labor and materials used by Glacier in the project. In connection with the letting of the contract, petitioner executed two surety bonds. One bond guaranteed performance of the contract; the other guaranteed payment to all persons supplying Glacier with labor and material.

Prior to its completion of the contract, Glacier defaulted on its obligations to certain suppliers and

workmen. Thereafter, petitioner, pursuant to its payment bond, paid claims of labor and materialmen aggregating about $126,000.[1] After petitioner commenced payment of these claims, but before all the moneys were disbursed, the Internal Revenue Service ("IRS") filed tax liens against Glacier for slightly more than $96,000. Notice of the liens was served upon the Highway Administration, which then held approximately $79,000 in retainage funds due to Glacier under the contract. The Highway Administration paid these funds to IRS.

Alleging that its interest in the retained funds was superior to the interest asserted by IRS, petitioner filed a petition in the Court of Claims, pursuant to 28 U.S.C. 1491, seeking a judgment against the United States for $78,534.89, representing the contract money retained by the government. On the government's motion, the Court of Claims dismissed the suit.

ARGUMENT

1. In upholding the right of the United States to apply funds it has retained under a government contract to satisfy the contractor's federal tax liability, the Court of Claims properly followed and applied *United States* v. *Munsey Trust Co.*, 332 U.S. 234. Contrary to petitioner's contention (Pet. 6-8), the

[1] While Glacier defaulted on these payments, it did complete performance of the contract. Accordingly, only the payment bond is in issue here.

dispositive holding of that case was not altered or weakened by *Pearlman* v. *Reliance Ins. Co.*, 371 U.S. 132.

Munsey Trust was a suit by the receiver of a government contractor, acting for the benefit of a contractor's surety who had paid the contractor's laborers and materialmen. The receiver sought to recover the amounts retained by the government under the contract. The government had applied part of the retained funds as a setoff against another claim it had against the contractor. The Court of Claims held that the receiver was entitled to the retainages for disbursement to the surety. This Court reversed, applying the settled principle that "[t]he government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him'." 332 U.S. at 239. See also, *Barrett* v. *United States*, 367 F. 2d 834 (Ct. Cl.).

The *Pearlman* case involved a different situation. The question there was whether a payment bond surety's subrogated rights to funds retained by the government were superior to the rights of the contractor's trustee in bankruptcy, to whom the government had disbursed the funds. The government was a mere stakeholder and was not a party to the suit. In holding that the surety was entitled to recover from the trustee the amount representing the funds retained by the government, the Court noted (371 U.S. at 139) that the surety has a "right to subro-

gation in such a fund whether its bond be for performance or payment."

Thus, *Pearlman* did not involve the question of the government's right to set off tax claims against contract creditors, nor did it affect the long-standing rule of *Munsey Trust*. Furthermore, the Court in *Pearlman* referred to *Munsey Trust* without in any way questioning its continued vitality. In considering the interrelationship of these two cases, the Fifth Circuit in *Trinity Universal Insurance Co.* v. *United States*, 382 F. 2d 317, certiorari denied, 390 U.S. 906, properly concluded (at 320):

> In Pearlman v. Reliance Insurance Co., 1962, 371 U.S. 132, 138, 83 S. Ct. 232, 236, 9 L. Ed. 2d 190, the Supreme Court recognized the well-established doctrine that "a surety who completes a contract has an 'equitable right' to indemnification out of a retained fund." *Munsey* did not disturb this rule, for as the Court noted in *Pearlman*:
>
> > "We held that the Government could exercise the well-established common-law right of debtors to offset claims of their own against their creditors. This was all we held. * * * We hold that *Munsey* left the rule in *Prairie Bank* and *Henningsen* undisturbed." 371 U.S. at 140, 141, 83 S. Ct. at 237.
>
> The rights of the surety in *Munsey* were those of a subrogee of the contractor. Whoever, be it the contractor or his surety, pays the laborers and materialmen would be a creditor of the gov-

ernment insofar as the retained funds are concerned. *Pearlman* at p. 141, 83 S. Ct. at 232. Of course, however, the government has a right to set off claims against its creditors.

The instant case falls squarely within the rule of *Munsey Trust*, which *Pearlman* did not disturb, that the government's right to apply retained funds as a setoff against its other claims against the contractor is superior to the surety's claim against those funds.

2. Contrary to petitioner's suggestion (Pet. 7), there is no conflict between the decision below and *Western Cas. & Sur. Co.* v. *Brooks*, 362 F. 2d 486 (C.A. 4). There, the contractor was not indebted to the government and, hence, the government was a mere stakeholder. Petitioner points to no court of appeals decision refusing setoff to the government in favor of a payment bond surety.[2]

3. Petitioner contends (Pet. 10-11) that "[u]nder the literal language of the Federal Tax Lien Act of 1966, 26 U.S.C. § 6323, a payment-bond surety is granted priority over a Federal tax lien" (Pet. 10). However, petitioner overlooks the fact that in the

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[2] In *Home Indemnity Co.* v. *United States*, 313 F. Supp. 212 (W.D. Mo.), which petitioner also cites, the district court improperly disallowed a tax setoff where the surety was proceeding under a payment bond, on the ground that the government's general right to setoff, which the court conceded was established by *Munsey*, "does not include the right of the United States to set-off taxes owing to the United States" (*id.* at 216). See the discussion of *Home Indemnity* in *Aetna Insurance Co.* v. *United States*, 456 F. 2d 773, 777 (Ct. Cl.).

instant case the federal claim is bottomed not on the tax lien statute but on a common law creditor's right to setoff. Enactment of 26 U.S.C. 6323 did not grant priorities to other creditors which affect or limit this right.

The legislative history of the Act shows that Congress did not intend to change the rule of *Munsey Trust*. The relationship of the Act to the *Munsey Trust* rule, which petitioner suggests was legislatively abrogated, was stated by the Treasury Department in the course of Congressional hearings as follows:

> * * * [N]othing in this bill is intended to reverse *U. S.* v. *Munsey Trust Co.* (1947), 332 U.S. 234, which held that the United States may set off amounts due it for taxes against amounts owned [sic] by the United States to the taxpayer under a contract. [Hearings before the House Committee on Ways and Means on H.R. 11256 and H.R. 11290, 89th Cong., 2d Sess. 48.]

The relevant committees of both houses, after ordering this statement included in the records of their respective proceedings, noted in their final reports that the Treasury Department urged that the bill be adopted. H. Rep. No. 1884, 89th Cong., 2d Sess. 3; S. Rep. No. 1708, 89th Cong., 2d Sess. 3. As the Court of Claims stated in *Aetna Insurance Co.* v. *United States*, 456 F. 2d 773, 776:

> It would certainly be extraordinary for both committees to represent to Congress that the Treasury urged the adoption of the bill if, con-

trary to the views expressed by the Assistant Secretary of the Treasury, there was any intent on the part of either committee to reverse the holding in *Munsey Trust*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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